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In the

# Supreme Court of the [illegible]

OCTOBER TERM, 19[illegible]

No. 61[illegible]

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THE CALIFORNIA-OREGON POWER COMPANY, a corporation,
*Petitioner,*

vs.

BEAVER PORTLAND CEMENT COMPANY, a corporation, and
CITY OF GOLD HILL, OREGON, a municipal corporation,
*Respondents.*

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BRIEF RESISTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

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Geo. Newbury, Medford, Oregon,
W. Lair Thompson, Portland, Oregon,
*Counsel for Respondents.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934

No. 612

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THE CALIFORNIA OREGON POWER COMPANY, a corporation,
*Petitioner,*

*vs.*

BEAVER PORTLAND CEMENT COMPANY, a corporation, and
CITY OF GOLD HILL, OREGON, a municipal corporation,
*Respondents.*

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## BRIEF RESISTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner is the owner of Lots 1 and 2, Section 15, Township 36 South Range 3 West of the Willamette Meridian in Oregon, for which a United States Patent was issued in 1885, said lands being situate on the east bank of Rogue River, an unnavigable stream.

Petitioner acquired these lands in 1921 (R. 67) from its predecessor, California-Oregon Power Company.

Respondent, City of Gold Hill, is the owner of Lots 6, 7 and 8 of said section, lying on the west side of said stream.

Respondent, Beaver Portland Cement Company, has an option and lease with said City of Gold Hill (*Exhibit A*, R. 38).

Respondents were engaged in constructing a power plant on their own, or west, side of the thread of the stream when this suit was filed by petitioner, and injunctive process issued.

In 1909 the Legislature of Oregon adopted a Water Code, which is set out in full at pages I to XXXIII of the appendix to the petition for writ of certiorari.

Under the provisions of this Code the State Water Board cited all persons claiming water rights on Rogue River to file with the board statements of claim to water, and the petitioner's predecessor, California-Oregon Power Company, filed its statement of claim for water at two points, and in pursuance thereof received an award by the State Water Board, which was confirmed by a final decree of the Circuit Court in 1919. This award gave the right to the use of water for power in the south half of Section 18, Township 36 South Range 2 West of the Willamette Meridian, at a site known as Gold Ray Dam, situate several miles up the river, from said land of petitioner described in the instant suit, the water to be returned to the stream in the South half of said Section (R. 361); and the right to use water for power purposes in the west half of the northwest quarter of Section 6, Township 33 South Range 3 East of the Willamette Meridian, some fifty miles distant and upstream from the lands of petitioner described in the instant suit (R. 401-402).

The records show no other claim made by Petitioner or its predecessor for use of the waters of Rogue River.

The predecessors in interest of respondent, City of Gold Hill (Neilson & McClure, and Oregon Water and Power Company) also filed claims to the use of the water of Rogue River in said proceedings and were awarded 75 second feet and 220 second feet respectively for power; and thereafter the respondent City further availed itself of the provisions of said Code by applying for and being awarded by the State Water Board of Oregon, under the

provisions of said Water Code, permits to use 1127 second feet of water for power purposes at the point in said stream in controversy in this suit (*Exhibit N*, R. 291).

Though the petitioner acquired its said lands in 1921, it has never done anything toward the establishment of a power plant, nor utilized any of the water or its said land situated in said Section 15 for any power or other development, nor was anything of like nature done by its predecessor.

Respondents, in a former suit instituted by petitioner in 1929, were restrained from constructing a dam across the entire stream with one end of the dam resting on petitioner's said land. Respondents, in 1930, began the construction of a power plant on its (west) side of the thread of the stream, when they were restrained in this suit from further construction. After hearing, the restraining order was dissolved and permanent injunction denied. This ruling was affirmed by the Circuit Court of Appeals for the Ninth Circuit.

We deem petitioner for certiorari is met *in limine* by certain obstacles:

(1) Where the waters of an entire stream course have been adjudicated under the Oregon procedure, and petitioner, a riparian owner, made no claim to water in that proceeding, can he at a date more than ten years subsequent to the decree of adjudication assert a right to the use of the waters of the stream antedating such decree, without claiming through such decree?

(2) Can the owner of land riparian to a stream, but who is making no use of the water on his riparian land, successfully invoke injunctive relief to prevent others from using the water of such stream? and

(3) Are the questions propounded in the petition for certiorari of such general interest as to justify a further consideration by this court?

**I. One claiming the right to use the waters of a stream as to which the courts of Oregon, under the method provided by Oregon law, have adjudicated the relative rights of all persons to the use of water, must claim through the adjudication if the claim is based upon a right asserted to antedate the adjudication; years after the adjudication such claimant should not be permitted to assert in the court a right which was not submitted to or asserted in such adjudication.**

*Vol. 3, Oregon Code* 1930, 47-619, 47-620.
*Pacific Livestock Co. v. Cochran* (1914) 73 Ore. 417, 428, 144 Pac. 668.
*In re Waters of Chewaucan River* (1918) 89 Or. 659, 680, 171 Pac. 402, 175 Pac. 421.
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*Pacific Livestock Co. v. Lewis* (1916) 241 U. S. 440, 443, 448, 60 L. ed. 1084, 1095, 1096.

We believe the proposition here submitted goes to the very life of the system of adjudication provided by the laws of the State of Oregon, under which rights to the use of the waters of a major portion of the streams of the state have been adjudicated. The plan is for a proceeding *in rem* (*Abel v. Mack* (1929) 131 Or. 586, 594) and is designed to adjudicate the *relative* rights of all claimants to the waters of a stream up to the date of adjudication. The clear purpose of the law is that when the machinery of the state is put into motion, every claimant shall present his claim, and eventually those claims shall be determined by a decree of court which will exclude any future assertion of a prior right to use of the water of that stream if

claim therefor was not presented when the relative rights of all users on the stream were adjudicated. We quote the two pertinent sections of the Oregon Water Code:

"The determinations of the state engineer, as confirmed or modified as provided by this act in proceedings, shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination." (*Section 47-619, Oregon Code 1930*)

"Whenever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. Any person, association or corporation interested in the water of any stream upon whom or which no service of notice shall have been had of the pendency of proceedings for the determination of the rights to the use of the water of said stream, and who or which shall have no actual knowledge or notice of the pendency of said proceedings may, at any time prior to the expiration of one year after the entry of the determination of the state engineer, file a petition to intervene in said proceedings. Such petition shall contain, among other things, all matters required by this act, of claimants who have been duly served with notice of said proceedings and also a statement that the intervener had no actual knowledge or notice of the pendency of said proceedings. Upon the filing of said petition in

intervention, the petitioner shall be allowed to intervene upon such term as may be equitable and thereafter shall have all rights vouchsafed by this act to claimants who have been duly served. (*Section 47-620, Oregon Code 1930*).

This Code, with a thorough discussion of its purpose, as we have above outlined, and with due emphasis upon the necessity of presenting claims if they are to be preserved, expressed in this language: "All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding", was approved by this court in the case of *Pacific Livestock Co. v. Lewis* (1916) 241 U. S. 440, 60 L. ed. 1084, and the law upheld as constitutional. This means that barring irreguarity in administration, every interest has had due process of law and equal protection of the laws. The form of tribunal is not controlling. (*Mountain Timber Company v. State of Washington* (1917) 248 U. S. 219; 61 L. ed. 685. *Evanhoff vs. State Industrial Accident Commission* (1915) 78 Or. 503, 516; 154 Pac. 106).

Repeatedly (cases above cited) the Supreme Court of Oregon has ruled that the adjudication of the waters of a stream determines the rights of *all* entitled to claim as of the date of adjudication, and cuts off any rights not presented to the adjudication but later claimed to have been acquired at a date anterior to the adjudication.

In the case at bar the fact that there had been an adjudication of the stream was pleaded (*R. 33*) and respondents asserted their rights in part under that adjudication, and in part under a permit to appropriate filed subsequent to the adjudication, pursuant to the terms of the Oregon Water Law.

Petitioner, however, asserts a right that was not submitted to the court in the adjudication of the relative

rights to the waters of Rogue River, although petitioner's predecessor was party to the adjudication. If the decree, entered as the result of an orderly adjudication of the relative rights to the waters of a stream, does not determine all rights to use the waters of that stream; if anyone claiming a right to the waters of a stream may ignore an adjudication according to the Oregon law and later assert a right without claiming through that decree,—then the Water Code is not only worthless, but it becomes a delusion and a snare.

Water rights on a stream are necessarily *relative*. That which is available for one depends upon the amount rightfully taken by another with priority. As pointed out forcefully by this court in the case of *Pacific Livestock Co. v. Lewis, supra,* the whole purpose of the Code is to obtain an orderly, effective and intelligent adjudication of the *relative* rights in such manner that a record thereof will be made available to all who may be interested in future development. If anyone claiming a right, not through the decree of adjudication, but based upon the acquirement of riparian lands by a predecessor, may enter the Federal Court on the ground of diversity of citizenship and ignore the adjudication of the rights of *all* claimants to the use of the waters of a stream, then we have a situation where there will be one rule governing those who can get access to the Federal Court and another rule governing those residing within the State of Oregon. If this can be done, then the entire adjudication is disturbed and disrupted, and of no value.

We submit that until the petitioner asserts a claim either through the decree adjudicating the relative rights to the use of the waters of Rogue River, or a claim acquired subsequent thereto in the manner provided by the Oregon Code, it should not receive consideration from this court.

We call the attention of the court to the fact that petitioner's predecessor in interest did submit itself to the jurisdiction of the state courts in the adjudication of the relative rights to the use of the waters of Rogue River and was awarded the right to use water at locations other than that involved in this litigation, but filed no claim for water at the location involved here (*R. 361*).

The water code provides for re-opening the adjudication upon proper showing *(Sec. 47-620 Oregon Code 1930)*. The administration board did take jurisdiction. Until the orderly processes provided by law have been invoked, we doubt the right of petitioner to appeal to the courts.

*Porter vs. Investors' Syndicate* (1932) 286 U. S. 461; 76 L. ed. 1226.

**II. The petitioner, regardless of its duty to submit its rights to the adjudication of the Oregon courts when the relative rights to the use of the waters of Rogue River were adjudicated, is not in a position to invoke injunctive relief until it can show irreparable damage.**

*Blair v. Boswell* (1900) 37 Or. 168, 170, 61 Pac. 341.

*State of Connecticut v. Commonwealth of Massachusetts* (1931) 282 U. S. 660, 673, 75 L. ed. 603, 609.

*Kinney on Irrigation and Water Rights,* (2d ed.) Vol. 3, Sec. 1597, p. 2906.

*Northport Brewing Co. v. Perrot* (1900) 22 Wash. 243, 60 Pac. 403.

*Brown v. Chase* (1923) 125 Wash. 542, 548, 217 Pac. 23, 25.

The undisputed fact is that neither petitioner nor its predecessors in interest in the lands now owned by petitioner, and for which a riparian right is claimed in this litigation, have done anything toward the physical construction of a power plant or other device to make use of the waters of Rogue River at this location. It is true that petitioner now states a desire to build a plant at that location, but the record indicates that such claims have been made by the predecessors in interest of petitioner and by petitioner since 1906 (*R. 27-31*). Like a fire alarm horse who hears the bell, petitioner's desire to build arises only when the respondents here undertake to build a power plant.

Under the general principles of equity, petitioner is not entitled to injuctive relief, and that is what it asks for in this litigation.

This court held in the case of *State of Connecticut v. Commonwealth of Massachusetts, supra,* that a power company which had been granted formal rights to build was nevertheless not in a position through its sovereign state to invoke injunctive relief until it could show that its actual operation had been damaged. Such is the general rule, and the rule in Oregon (cases cited *supra*).

**III. A writ of certiorari will ordinarily be refused unless there is a lack of uniformity of decision between the several Circuit Courts of Appeal, or the case involves important questions of public interest.**

*Hamilton Brown Shoe Co. v. Wolf Bros. & Co.,* (1915) 240 U. S. 251, 60 L. Ed. 629.

*Magnum Import Co. v. Coty,* (1922) 262 U. S. 159, 67 L. Ed. 922.

The principle above stated has been repeatedly held by this court and is pointedly expressed in the two cases above cited. Supreme Court Rule 35, in paragraph five, points out the character of reasons which will be considered by this court in exercising its judicial discretion as to granting a writ of certiorari. We seriously doubt whether the record in this case exhibits any of those reasons. The contention of petitioner, while divided into nine "grounds for the allowance of the writ" (*Petition*, p. 5), may really be discussed in two subdivisions: (a) Whether the opinion of the Circuit Court of Appeals is in conflict with the decisions of this court and of the Supreme Court of Oregon and whether the opinions of the latter court are in reasonable harmony, and (b) Whether petitioner has a vested right to have the waters of Rogue River flow by his land undiminished in quantity without putting the same to beneficial use.

(*a*) The suggestion that the decision of the Circuit Court of Appeals is out of harmony with the rulings of the Oregon Court and the ruling of this court with respect to the effect of the Oregon Water Code is, we submit, without merit. The decision of this court to which petitioner refers is the case of *Pacific Livestock Company v. Lewis*, (1916) 241 U. S. 440, 60 L. Ed. 1084, and rests upon the statement of this court in that case that the Oregon Water Code preserves vested rights. However, in that case this court had for consideration the entire Water Code. (We will not quote it here. It is printed in full beginning at page 1 of the *appendix to the petition.*) That Act provides for the preservation of vested rights, but defines a vested right in a riparian owner to be a right to the use of the quantity of water that had been theretofore put to a beneficial use, or the application of which to a beneficial use was then pending (Section 70, *Appendix to Petition*, p. xxix). The de-

cisions referred to by counsel as being controlling decisions of the State of Oregon for petitioner's contention of lack of harmony are not entitled to that designation.

*Norwood v. Eastern Oregon Land Co.*, (1924) 112 Or. 106, 227 Pac. 1111, must be read in light of the fact that it was litigation to enforce a prior decree of the court. In the earlier adjudication of the waters of Willow Creek (*In re Willow Creek*, (1915) 74 Or. 592, 144 Pac. 505) the Eastern Oregon Land Company had claimed as a riparian owner water for the irrigation of approximately 7000 acres of land. Of this area approximately 292 acres had had actual irrigation from overflow of the stream. The court rejected the riparian claim as to all of this land except the 292 acres, although all of the land was riparian to the stream, and limited the riparian right to the amount of water actually put to a beneficial use. After that decree was entered the Eastern Oregon Land Company undertook to change the place of use of the water granted for its 292 acres and was sued by Norwood because Norwood was damaged by that change. What the court was doing in the so-called Norwood case was enforcing the decree entered in the adjudication entitled *In Re Willow Creek, supra*, and was not determining any other question, certainly not any question of riparian rights other than that *as to irrigation* a riparian right is inseparable from the land.

*Logan v. Spaulding Logging Co.*, (1920) 100 Or. 731, 736, 190 Pac. 349, was one of the Oregon "splash dam" cases in which a logging company undertook to "splash" the river by impounding water behind a dam, loading the surface of the impounded water with logs, and then opening the dam and shooting these logs downstream. The plaintiff had a grist mill on the bank of the stream which he and his predecessors had operated for more than fifty years. The "splashing" of the stream flooded his water wheel so that he could not operate his grist mill. This was enjoined. It is worthy of note that this plaintiff's claim

was a claim that was in use when the Water Code was adopted, and therefore came under Section 70 protecting riparian rights in use at the time the Code was enacted.

In each of the above cases (and they are the ones upon which petitioner seems to rely) the Code was strictly applied. The only right, whether riparian or otherwise, preserved under the riparian claim of Eastern Oregon Land Company in the *Norwood* case was the right perfected by actual application of the water to a beneficial use, and the same is true of the *Logan* case.

The fact is that the Supreme Court of Oregon since 1908 has consistently ruled against riparian rights based upon location of land, and not upon user of the water, if the land was acquired after the enactment of the Desert Land Act in 1877; and since 1909 has consistently ruled against riparian rights based upon location alone, regardless of when the land was acquired.

*Hough v. Porter*, (1909) 51 Or. 318, 399, 95 Pac. 732, 98 Pac. 1083.

*In re Willow Creek*, (1915) 74 Or. 592, 628, 144 Pac. 503.

*In re Hood River*, (1924) 114 Or. 112, 157-182, 227 Pac. 1065.

In view of the nature of the *Norwood* and *Logan* cases, *supra*, we think the statement of petitioner under reason 7 (p. 7-8 of Petition) that the Supreme Court of Oregon has made decisions since petitioner acquired his land construing Section 70 of the Water Code "both to have and not to have destroyed vested riparian rights not put to beneficial use before the enactment of the Water Code" is not justified. We are not aware of a single decision of the Supreme Court of Oregon rendered since a date long anterior to the time petitioner acquired its land that upholds a claimed riparian right where the water has not been

put to a beneficial use (excluding from this statement certain riparian rights of wharfage, etc., which do not disturb the use of water by others).

(*b*) We now discuss the question of what is a vested riparian right, and whether the action of the Supreme Court of Oregon in steadily modifying its views as to riparian rights in this state, and the action of the Legislature in defining and limiting a vested riparian right, have deprived petitioner of the equal protecton of the laws or have taken its property without due process of law.

The Circuit Court of Appeals grounded its decision upon the exercise of the police power of the state, and did not follow the reasoning of the Supreme Court of Oregon as to lands acquired after enactment by Congress of the Desert Land Act (1877). In the instant case it should be quite immaterial to petitioner which ground the conclusion is rested on, because petitioner's land was admittedly acquired after 1877.

The suggestion that enactment of the Water Code was not an exercise of the police power (*Point* 8, *Petition* p. 8) must have been inadvertently made by petitioner. The Circuit Court of Appeals emphasized the language of the emergency clause attached to the Water Code as indicative of the necessity of the enactment for the public welfare, but regardless of the emergency clause, the power which the Legislature of a state exercises when it passes a law regulating the method of acquiring, perfecting, preserving and adjudicating water rights is the reserved police power of the state.

*3 Kinney on Irrigation and Water Rights* (2d ed.), p. 2842.

*2 Wiel, Water Rights in the Western States*, 3rd ed., p. 1097.

*Home Building & Loan Assn. v. Blaisdell,* (1934) 290 U. S. 398, 78 L. ed. 413, 88 A. L. R. 1481.

*Nebbia v. People of the State of New York,* (1934) 291 U. S. 502, 78 L. ed. 940.

While it seems a work of supererogation to argue that the enactment of a law such as the Water Code is an exercise of the police power, we refer to the decisions of this court in the *Blaisdell* and *Nebbia* cases, where there are gathered a long list of illustrations of the exercise of the police power, ranging from acts to protect the public morals by regulating or prohibiting lotteries and sales of intoxicating liquor, and the prevention of nuisances, to legislation to protect the public safety, regulate the highways, promote economic welfare, and to regulate the use of water by riparian owners and others. (*Maginault v. Springs,* (1905) 199 U. S. 473, 50 L. ed. 274.)

It is true that there have been many decisions of the Supreme Court of the State of Oregon dealing with riparian rights. The very earliest of those decisions upheld quite fully the common law doctrine. However, at an early day the Supreme Court of Oregon recognized and sustained water rights by appropriation conveying water to lands that were not riparian to the water course, which immediately constituted a modification of the common law riparian rights, and since an early day the Supreme Court of Oregon has refused to apply the common law doctrine in the manner here demanded by petitioner, to-wit, the right of the riparian owner to have the water flow through or by his land undiminished in quantity, although the riparian owner is not putting the water to beneficial use and his action will constitute a monopoly depriving others of the use of the water.

Without undertaking to review all of the decisions dealing with this subject, we ask the court to consider the case of *In re Hood River,* (1924) 114 Or. 112, 181, 189, 203,

and the review of earlier cases in that decision. At page 162 the court begins a discussion of the history of riparian rights in the State of Oregon, especially with respect to the control by the state over that doctrine. At page 166 the court states that only a modified common law doctrine has prevailed in this state and then, after asserting flexibility and adaptability to be the very essence of the common law, the prevailing opinion, beginning at page 181, has this to say about the power of the legislature to define a vested riparian right:

"It was within the province of the legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor: Kansas v. Colorado, 206 U. S. 46, 94 (51 L. Ed. 956, 973, 27 Sup. Ct. Rep. 655, see, also, Rose's U. S. Notes); Sternberger v. Seaton, 45 Colo. 401, 403 (102 Pac. 168); Clark v. Nash, 198 U. S. 361 (4 Ann. Cas. 1171, 1174, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676); Atchison v. Peterson, 87 U. S. 508 (22 L. Ed. 414); Boquillas L. & C. Co. v. Curtis, 213 U. S. 339 (53 L. Ed. 822, 29 Sup. Ct. Rep. 493); Van Dyke v. Midnight Sun M. & D. Co., 177 Fed. 85 (100 C. C. A. 503); United States v. Rio Grande Irr. Co., 174 U. S. 690, 703 (43 L. Ed. 1136, 19 Sup. Ct. Rep. 770, see, also, Rose's U. S. Notes).

"The statute of this state plainly declares that all waters within the state from all sources of water supply belong to the public: Section 5715 Or. L. This is, of course, subject to the further provision of the act. As we have noted the courts of this state and other states and of the United States have upheld the legislative enactments of this state and other similar statutes. Rights to public waters can be acquired as provided by

the several statutes of this state: Cookingham v. Lewis, 58 Or. 484, 490 (114 Pac. 88, 115 Pac. 342); Caviness v. La Grande Irr. Co., supra.

"Under our present statute, defining what shall constitute a vested right of a riparian proprietor, the claim of the Pacific Power & Light Company as a riparian owner of land on Hood River to a continuous flow of the specified quantity of water over its land cannot be maintained."

It is interesting, in considering this case, to refer to the two special concurring opinions. Chief Justice McBride, in concurring, had this to say about a vested right and the section of the Water Code defining it (114 Or. 189):

"It is difficult exactly to define in what a vested right in the use of water consists. Practically, there is no such a thing as property in the water of a flowing stream. The riparian proprietor may own the banks, and even the bed of a non-navigable stream, but he no more owns the water than he owns the air. His only right is the right of using it. In this country we have ceased, to a great extent, to apply, in its original severity, the common-law doctrine, 'Water runs, and it ought to run as it is accustomed to run.' This maxim, while very convenient in expression, was never in fact practically applied in common law to its full extent.

"The riparian rights to water, or to the use of water, may be divided into two classes—natural uses, and other uses which may be deemed extraordinary. Natural uses, which I deem to be those that vest in a riparian proprietor at the very moment that he obtains title to land bordering on a natural stream, include the use of water for domestic purposes of his home or farm, such as drinking, washing or cooking, or for his stock. These might well be construed to extend to all culinary and household purposes, even to the watering of a garden

and things of that character, and, so far as irrigation is concerned, the watering of a small garden is about the extent of use to which any kind of irrigation was put at the time of the common law. All other uses are extraordinary, and may be classed rather as privileges than as rights, and, as to such, I do not believe the theories of the common law should be applied.

"All confess that the common-law theory of riparian rights has been modified in this country in many respects, either by legislation or by holdings of the courts declaring it inapplicable in some particulars to conditions in this country, and the fact that such modifications have been upheld by the courts strongly indicates that, except as to the natural uses before mentioned, no constitutional right to the enjoyment of the flow of a stream exists, but that the use in these extraordinary respects is in the nature of a mere privilege, over which the legislature has jurisdiction.

"As to manufacturing and the use of water by dams, it does not seem to me that it ever arose in this country above the dignity of a mere privilege, over which the legislature had complete control. This is especially true of mills. Very many of the decisions, in referring to a mill site, speak of it as a 'mill privilege'."

Mr. Justice Coshow, also specially concurring, defined a vested right in this manner (114 Or. 203):

"Every riparian owner, to a certain extent, has a vested property right. By being the owner of the bank, he has access to the water and to its use for any lawful purpose. To the extent he has used it, that use of it is a vested property. To that extent, it may be said he has applied the water to a beneficial use. It may be truthfully said, to that extent, he has appropriated the water.

The use of water, therefore, has become a vested, fixed and valuable property right. The doctrine of the Dartmouth College Case, 17 U. S. (4 Wheat) 518 (4 L. Ed. 629, see, also, Rose's U. S. Notes), protects such property against the invasion by the state either acting through its Constitution, legislative enactments, or judicial decisions. The right to have the water flow by and through his premises, undiminished in quantity and unimpaired in quality, in the opinion of the writer, is not such a vested property."

That the state may with propriety amend its laws with respect to riparian rights cannot be seriously questioned.

"But the laws in respect of riparian rights that happen to be effective for the time being in both States do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented. The rules of the common law on that subject do not obtain in all the States of the Union, and there are variations in their application. The doctrine of appropriation prevails in some States. And every State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise. United States v. Rio Grande Irrig. Co., 174 U. S. 690, 702, 43 L. ed. 1136, 1141, 19 S. Ct. 770."

*State of Connecticut v. Commonwealth of Massachusetts,* (1931) 282 U. S. 661, 670, 75 L. Ed. 603, 607.

We suggest that petitioner is not in a position to assert a property right in a decision of the court not dealing with the specific property which petitioner owns, but discussing general principles always subject to change. Petitioner

could not place reliance upon decisions of the Supreme Court of Oregon from which that court had departed in later decisions.

*Oliver Co. v. Louisville Realty Co.*, (1913) 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293.

The only exception to the rule that an overruled decision never was the law is where a contract is made in reliance on a decision construing a statutory or constitutional provision.

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*Mason v. A. E. Nelson Co.*, (1908) 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221.

Remembering that petitioner acquired its lands involved in this litigation in the year 1921, we say that prior to that date the Supreme Court of Oregon had handed down a number of decisions modifying the common law pertaining to riparian rights—decisions which pointed out that there are various kinds of riparian rights; that the riparian claim to water for irrigation is inseparable from the land, but the riparian claim for wharfage rights, the right to build power houses, water wheels, etc., may be sold separately from the land. (*Coquille Mill & Mercantile Co. v. Johnson*, (1908) 52 Or. 547, 98 Pac. 132; *Pacific Elevator Co. v. Portland*, (1913) 65 Or. 349, 398, 133 Pac. 72.) The court had ruled in favor of a common law riparian right limited to the use of water for domestic purposes, stock water and garden irrigation, and had definitely ruled against the existence of a riparian right to control or have flow past one's land the body of the stream without use. In the case of *Williams v. Altnow*, (1908) 51 Or. 275, 95 Pac. 200, 97 Pac. 539, the court first called attention to the provisions of the Desert Land Act enacted by Congress and suggested that the language was broad enough to put an end to riparian rights for lands acquired after 1877. In

*Hough v. Porter,* (1909) 51 Or. 318, 399, 95 Pac. 732, 98 Pac. 1083, the Supreme Court of Oregon passed an opinion definitely holding against riparian claims for lands acquired after 1877. In the course of that opinion, at pages 410-411 of 51 Oregon, the court reviews a long list of earlier decisions of the Oregon Supreme Court, where claims had been based upon riparian rights, and holds that in none of them did the date of initiation of title appear to have been after 1877.

We particularly ask the court to note that the Supreme Court of Oregon in this case, beginning at page 408 of 51 Oregon, discussed the case of *Stur v. Beck,* 133 U. S. 541, 33 L. ed. 761, upon which petitioner so much relies in the case at bar, and points out that this court later ruled that the courts of each state had the power to determine the common law and its applicability for that state.

In 1909 the Oregon Water Code was enacted, defining the vested right of a riparian owner as the right to use the amount of water that had been theretofore applied to a beneficial use, or the application of which was then in process. In 1916 this court passed its opinion in *Pacific Livestock Company v. Lewis,* 241 U. S. 440, 60 L. ed. 1084, sustaining this Oregon Water Code. In 1915 the Supreme Court of Oregon passed its opinion definitely limiting the vested right of a riparian owner whose title was initiated prior to 1877 to the amount of water put to a beneficial use prior to adjudication.

*In re Willow Creek;* 74 Or. 592, 628, 144 Pac. 505.

Title to the lands of petitioner was initiated in 1885, after the enactment of the Desert Land Act. Petitioner in 1921, after all of these court decisions and this legislation, purchased its land. In 1924 the court passed its decision *In re Hood River,* 114 Or. 112, 227 Pac. 1065, in which it upheld Section 70 of the Water Code. That this decision upholding the law of 1909 was not handed down

until 1924 wouldn't affect the validity of the law or its binding effect upon petitioner. (*Ross v. Oregon* (1912) 227 U. S. 168, 57 L. ed. 458, 463).

In 1919 the Circuit Court of the State of Oregon for Jackson County (where petitioner's land is located) passed its decree in a proceeding to adjudicate the relative rights of all claims to the use of the waters of Rogue River and its tributaries (*Defendant's Exhibit O—R. 361*), in which it decreed certain rights to the predecessor of respondent here and certain rights to the predecessor in interest of petitioner, but decreed no rights appurtenant to the land of petitioner now in litigation and for which no right was claimed in said adjudication. The Rogue River adjudication reached the Supreme Court of Oregon (124 Or. 7). As suggested earlier in this brief, a water adjudication under the Oregon Water Code is *in rem*, and every inch of land riparian to the stream under adjudication is called upon to assert its claim, if it has any. Petitioner's land is riparian to Rogue River. The effect of the adjudication, without award to petitioner's land, is a decree that petitioner's land has no water right.

In view of this series of decisions, one at least negatively affecting the specific land for which petitioner is now claiming a water right, is it possible that petitioner can be heard to say that its land was purchased in 1921 in reliance upon a riparian right to have the full flow of the stream go past its land without use?

We submit the petition for writ of certiorari should be denied.

GUS NEWBURY, Medford, Oregon,
W. LAIR THOMPSON, Portland, Oregon,
*Counsel for Respondents.*